

You have presented a hypothetical situation in which a part-time Commonwealth's Attorney, in his capacity as a private attorney, represents a small local corporation engaged in retail sales. The owner of the corporation has reported to the Commonwealth's Attorney that a customer has given him a large check (several thousand dollars) that has now been returned by the customer's bank marked "insufficient funds". The corporation/client also brings a copy of a letter, addressed to the customer, that he has prepared in an effort to comply with § 18.2-183 of the Code of Virginia, as amended. Because of the amount of the check, the client desires to insure that all available remedies, both criminal and civil, are preserved.

You further indicate that the attorney's initial review of the client's letter reveals that there are some technical deficiencies that, in his opinion, would result in a failure of the letter to conform to the above-referenced statute. The attorney's proposed initial course of action is to (1) make minor technical adjustments to the client's proposed letter in order that it will conform to the statutory requirements of § 18.2-183, and (2) prepare a civil warrant in debt to be filed on behalf of the client in the General District Court. You state that the client's letter, even after technical suggestions by counsel, does not contain a specific threat of criminal prosecution but instead states that failure to make timely payment after receipt of written notice raises a presumption of the intent to defraud or knowledge of insufficient funds.

You state that the attorney explains to his client that, as Commonwealth's Attorney, he will not be able to prosecute any criminal charges that may arise in the event that his customer fails to respond to the five-day written notice. You also add that after consultation with Virginia State Bar staff and review of various Disciplinary Rules, Ethical Considerations, and prior Legal Ethics Opinions, the attorney has advised his client that he may not be able to represent him in the civil action in the event that a criminal charge is subsequently brought.

You have asked the committee to opine under the facts of the inquiry, (1) whether the Commonwealth's Attorney may continue to represent the client if a special prosecutor is appointed in the criminal matter; (2) whether it is a violation of DR:7-104(A) to advise a client to make minor technical changes in his proposed letter to a customer who has delivered to the client a check drawn on an account with insufficient funds, in order that the client's letter will conform to the provisions of § 18.2-183 of the Code of Virginia, and (3) whether a Commonwealth's Attorney may ever advise nonclient citizen/merchants regarding the technical requirements of § 18.2-183.

The appropriate and controlling Disciplinary Rules related to your inquiry are DRs 5-105(A) and (B) which provide respectively that a lawyer shall not accept proffered employment or continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR:5-105(C); DR:5-105(E) which requires that if a lawyer is required to decline employment

or to withdraw from employment under DR:5-105, no partner or associate of his or his firm may accept or continue such employment; DR: 7-103(A)(2) and (B) which provide respectively that a lawyer shall not give advice to a person who is not represented by counsel, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client and that, in dealing with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested; and DR:7-104 which states that a lawyer shall not present, participate in presenting, or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.

The committee opines relative to your inquiries as follows:

1. The committee is of the view that where a special prosecutor is appointed by the court, the concerns as to the part-time Commonwealth Attorney's exercise of professional judgment are not present. Thus, the committee opines that the Commonwealth's Attorney may, under DRs 5-105(A) and (E), represent his client in a civil action against the customer if an independent special prosecutor is appointed to investigate or try the criminal charges.

The committee cautions, however, that the Commonwealth's Attorney may not use his public position to influence, or attempt to influence, the court to act in favor of himself or of the client, as prohibited under DR:8-101(A)(2).

2. The committee has previously opined that it is unethical for counsel to allude to possible criminal prosecution, when corresponding with a debtor, for the sole purpose of advancing his client's civil claim. See LE Op. 715, LE Op. 716.

The committee is of the opinion that it would not be improper, under DR: 7-104(A), for an attorney to assist his client in meeting the technical requirements necessary to protect and preserve a client's rights under the criminal statute. The committee believes, however, that it would be unethical for an attorney to assist his client in alluding to criminal prosecution if such notice were for the sole purpose of obtaining an advantage for the client in his civil suit. See LE Op. 1388.

3. The committee is of the belief that the act of assisting a nonclient citizen/merchant as to technical requirements of the statute, without more, "do[es] not amount to 'advice ', and [is] proper as long as the attorney does not engage in misrepresentation or overreaching." *Dolan v. Hickey*, 431 N.E.2d 229, 231 (Mass. 1982).

Since no attorney-client relationship exists between the Commonwealth's Attorney and the citizenry, it would not be improper for the Commonwealth's Attorney to advise citizen/merchants regarding the technical requirements of § 18.2-183 of the Code of Virginia, provided that the Commonwealth's Attorney assiduously refrains from interpreting or misleading the unrepresented individuals as to the law or facts. See LE Op. 1464.

Committee Opinion
December 14, 1993